90-1728

No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

SALVATORE INGRATI,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Are trial courts required to define "reasonable doubt" in order to insure that criminal defendants are not convicted upon a lesser standard of proof?

2. Should this Court resolve a split of authorities among the Courts of Appeals regarding whether trial courts are required to define reasonable doubt?

3. Should this Court review the Court of Appeals' determination that the failure to charge the presumption of innocence and to define reasonable doubt did not constitute plain error, in order to correct the failure to follow this Court's decisions in *Taylor v. United States,* 436 U.S. 478, 98 S.Ct. 1930 (1978) and *Kentucky v. Whorton,* 441 U.S. 786, 99 S.Ct. 2088 (1979)?

LIST OF PARTIES

Petitioner, Salvatore Ingrati, together with Alexis Telesford, were defendants-appellants below. The United States of America was plaintiff-appellee.

Separate appeals were also prosecuted by the following defendants-appellants: Ignazio Lena, Nicola Lante, and Francesco Bellitti.

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SALVATORE INGRATI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Salvatore Ingrati petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals affirmed petitioner's conviction in a memorandum opinion (Appendix A, *infra*).[1] That opinion incorporated a separate memorandum opinion of

1. References to the Appendices to this petition are by "App. A" or "App. B."

the Court in the related case of *United States v. Telesford,* No. 90-3381, which resolved some of the same issues raised by Ingrati. (Appendix B, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1991. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty or property, without due process of law * * *.

STATEMENT

The petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. § 846, distributing heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and possessing a firearm during the Commission of a Narcotics Offense in violation of 21 U.S.C. § 924(c)(1). He was sentenced pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3557 *et seq.*, to concurrent terms of 260 months for conspiring and distributing heroin and a consecutive term of 60 months for possession of a firearm. A five-year term of supervised release was also imposed and he was required to pay a $150.00 special assessment (A. 549-52).[2]

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2. "A" refers to the appellant's Appendix and "GX" refers to the government exhibits.

1. Between June, 1987, and July, 1989, undercover agents purchased heroin, and occasionally cocaine, from a group of individuals operating principally from New York. Until February 28, 1989, the agents had purchased heroin on nine occasions and cocaine on two occasions from a group of nine individuals including Faro Bartolotta, Pietro Liga, Ingrazio Lena, Francesco Bellitti, and Alex Telesford. The agents dealt primarily with Bellitti and Lena. Lena identified Bartolotta as the head of the organization and a source for heroin. He identified a co-defendant, "Paco," as their "main guy" from Columbia for supplying cocaine (A. 63-64).

On February 28, 1989, the undercover agent purchased one-half kilogram of heroin from Bellitti and Lena. During that transaction, Lena indicated that the heroin had come from different "people" than in the other sales, although the new source was reported to be related to Bartolotta (A. 48-55, 121-125, GX 15).

During this transaction, Ingrati was, for the first time, observed meeting one of the other co-conspirators. After the undercover agent gave the "buy" money to Bellitti and Lena, Lena took the money home in a gym bag. Later the agents saw Lena leaving his residence carrying the gym bag. He drove to a diner where he met the appellant Ingrati. Subsequently, Lena returned to his residence where he obtained a plastic bag. Then he met the undercover agent and gave him the narcotics.

Next, the FBI decided to solicit larger transactions in order to identify other sources of supply. At first the undercover agent discussed with Bellitti the purchase of large amounts of cocaine. When it appeared that no cocaine was available, they negotiated a 1 and 1/4

kilogram heroin deal (A. 60-73, 79-94). On July 13, 1989, Lena and Bellitti delivered a sample of heroin to the agent (A. 96-99).

On July 18, 1989, the petitioner together with Lena, Macri, and the petitioner's nephew, Cosmo Ingrati, drove in three vehicles from New York to Delaware. Outside of the petitioner's presence, Macri asked Cosmo to transport the heroin in his van. In route to Delaware, the petitioner and Macri travelled separately in Cosmo's wife's mini-van. When they arrived at a pre-arranged rest stop to transfer the heroin, Lena informed the agent that the heroin was being transported in a truck. When Ingrati and Macri passed in front of the agent and Lena, the agent asked if they were Lena's "buddies." Lena nodded affirmatively (A. 106). After Cosmo arrived with the drugs, the petitioner took the bag containing the heroin from Cosmo's van and placed it in the trunk of the agent's car (A. 310, 322, 334, GXs 52C-1 and 52D). The bag contained 1,271 grams of heroin (A. 116, GX 17A-17C).

Macri was arrested carrying a gun (A. 337). A search of the mini-van revealed a .32 caliber pistol on the rear seat under a blanket and a baby seat but within reach of the driver (A. 358, 366). Cosmo testified that neither he nor his wife owned a handgun and that he had never before seen either the gun seized from Macri or the gun found on the rear seat of the mini-van (A. 262).

2. The petitioner testified that he knew Macri, Bellitti, and Lena, and that although he met with one or more of them on days when narcotics transactions occurred, he was engaged in lawful activities and was unaware of any narcotics deals (A. 374). The petitioner also testified that on July 18, 1989, he drove to Delaware

as a favor for Macri. According to Ingrati, when Macri went into Cosmo's van to get something, he hurt himself. As a result, the petitioner went to the van and at Lena's request, took the bag from Macri and put it in the undercover agent's car. The petitioner said that he had not seen the bag of heroin before. Nor was he aware of its contents, since it was closed (A. 384). The petitioner's testimony concerning the lawful nature of his activities in New York was corroborated by Joseph Giovinazzo (A. 368).

3. On three separate occasions during cross-examination, the prosecutor asked the petitioner if the government agents had lied. Over objection, the petitioner was forced to answer (A. 400-401, 405-406, 408).[3] In summation the prosecutor pressed the argument that the defendant had called the government's agents liars:

> The next pictures [sic] shows that at this point Salvatore Ingrati has gone and gotten into his Cadillac, sitting in the driver's seat while Macri, Bellitti and Lena are standing right there and they are in discussion. This was the time when Agent Ryan said that he saw Lena reach into the Cadillac. Yesterday Mr. Ingrati called Mr. Ryan a liar and said he lied in that regard. Again, I submit to you the FBI agents were just

3. These questions were objectionable because they were argumentative and because determining credibility is the province of the jury. They also were an attempt to shift the burden of proof and improperly to suggest to the jury that the case turned on whether they believed the defendant or the surveillance agents.

> simply attempting to testify about what they saw and not draw conclusions. There was no reason for Agent Ryan to lie about that (A. 452).[4]

Then the prosecutor argued:

> Now, you've heard the testimony of FBI Surveillance Agent Vaughn Antab. He was one of the agents close in surveillance that morning. He testified that he saw Francesco Bellitti shake hands with Vincenzo Macri while Lena was sitting in the Lincoln and Salvatore Ingrati was sitting in the driver's seat of the mini van. He saw Macri get into the mini van and the two vehicles leave in tandem, one following the other.
>
> Yesterday Salvatore Ingrati claimed that the agent lied about that. Remember, he said he never saw anyone at the diner other than Macri. He told you the story about dropping Macri off and going to get gas for the mini van. I submit to you again there is no reason for Agent Antab to lie about that. Between the two of them, I submit to you the one to believe that was telling the truth is agent Antab (A. 455).

4. While the Court instructed the jury at length at the close of the case, it failed to charge that the defendant was presumed innocent and that the presumption obtained at every stage of the trial including during

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4. The statement that there was "no reason for Agent Ryan to lie about that" also comes close to vouching for the agent's credibility and interjecting the prosecutor's own credibility and extra-judicial knowledge into the case.

their deliberations.[5] In addition, although the Court charged the jury on a number of occasions that the prosecution had the burden of proving the defendant's

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5. The Court had briefly commented on the presumption of innocence when the jury was empaneled (A. 41-42) but failed to so charge at the critical moment before deliberations commenced. Moreover, the charge at the close of the case was typed and a copy was given to each juror to read in the jury room (A. 508). Therefore, the instructions upon which they focused during their deliberations omitted this important charge. Further, in its preliminary instructions at the trial's outset, the court did not tell the jury that the presumption continued throughout every stage of the proceedings, including the jury's deliberations, and that the presumption alone, if not overcome by proof beyond a reasonable doubt, compelled a not guilty verdict. Significantly, the court characterized its opening remarks as a description of how the proceedings would be conducted rather than rules binding upon the jury during its deliberations:

> THE COURT: Members of the jury, before we begin the trial, I would like to tell you about what will be happening.
>
> I want to describe how the trial will be conducted and explain what we will be doing, you, the lawyers for both sides and I.
>
> At the end of the trial I will give you more detailed guidance on how you are to go about reaching your decision, but now *I simply want to explain how the trial will proceed* (A. 39) (emphasis added).

The court also told the jury several times that it should decide the case based upon the rules of law given by the court after the final arguments were completed (A. 43-44). Finally, during its final charge, the court did not refer the jury to its opening remarks or tell them that they were bound by those remarks. Thus, the trial court left the jury with the clear belief that the preliminary charge was not very important and was not binding upon the jury in its deliberations. Instead, the jury was told that it would be required to decide the case based upon the charge to be given at the close of the case.

guilt beyond a reasonable doubt (*see, e.g.*, A. 513, 520-21, 529), it never defined that term.[6]

REASONS FOR GRANTING THE PETITION

This case presents a question of fundamental importance to the administration of criminal justice in the federal courts, which has divided the Circuit Courts of Appeals. The issue for resolution is whether a trial court's failure to define the crucial concept of "reasonable doubt" is reversible error. A collateral issue is whether the Court of Appeals properly applied this Court's holdings in *Kentucky v. Whorton,* 441 U.S. 786, 99 S.Ct. 2088 (1979) and *Taylor v. Kentucky,* 436 U.S. 478, 98 S.Ct. 1930 (1978), when it determined that the failure to charge the jury on the presumption of innocence or to define "reasonable doubt" did not constitute plain error.

1. The requirement that no man be convicted of a criminal offense unless guilt is established by proof beyond a reasonable doubt is vital to the fair administration of justice:

> The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principal whose "enforcement lies at the foundation of the administration of our criminal law." *In re Winship,* 397 U.S. 358, 363, 90 S.Ct. 1068, 1072 (1970), *quoting Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 403 (1895).

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6. While the charge was not objected to below, these fundamental omissions warrant reversal of petitioner's conviction because they violated his right to due process of law.

The reasonable doubt standard minimizes the risk of convictions based upon factual errors. It thus, safeguards the vital interests of the accused by insuring that no person is deprived of his liberty or his dignity unless the jury is virtually certain of the facts in issue. *Id.* at 363-64, 90 S.Ct. at 1072. The necessity of proving guilt beyond a reasonable doubt is, therefore, mandated by the Due Process Clause of the Fifth Amendment. *Id.* at 364, 90 S.Ct. at 1073. However, the Constitutional requirement is meaningless unless its meaning is clearly and unequivocally conveyed to the jury for unless the jurors clearly understand this concept, they cannot fulfill their indispensable function. "[T]he reasonable doubt standard is indispensable for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In Re Winship,* 397 U.S. at 364, 90 S.Ct. at 1072. But how can this heavy burden be conveyed to the trier of the facts?

2. It is elementary that no matter how compelling the concept, if it is not conveyed to the trier of fact in a meaningful and comprehendible fashion, it amounts to no more than a talismatic incantation. The court can repeat the phrase "beyond a reasonable doubt" a hundred-fold in its charge, but if the court fails to convey the heavy burden this concept imposes upon the prosecution in terms meaningful to the average lay person, then this constitutionally mandated safeguard is no more than an illusion. In such circumstances its true implications exist only in the minds of jurists and lawyers.

Nevertheless, this seemingly fundamental and straightforward precept has sparked a serious division of opinions among the circuit courts of appeals. Some circuits have held that the trial court must define reasonable

doubt if requested to do so. *Friedman v. United States,* 381 F.2d 155, 160 (8th Cir. 1967); *Blatt v. United States,* 60 F.2d 481 (3d Cir. 1932) (Questioned in the present opinion to the extent it held that a failure to define reasonable doubt was reversible error). Other circuits have held that "reasonable doubt" need not be defined because it is self-explanatory and because it is a difficult term to define, often resulting in a lowering of the burden. *United States v. Campbell,* 874 F.2d 838 (1st Cir. 1989); *United States v. Headspeth,* 852 F.2d 753 (4th Cir. 1985); *United States v. Marquardt,* 786 F.2d 771 (7th Cir. 1986). While the Ninth Circuit has held that determining whether to define "reasonable doubt" rests in the discretion of the trial court. *United States v. Nolasco,* 926 F.2d 869 (9th Cir. 1991) (*en banc*).

The circuit courts that hold that no definition need be given rely primarily upon two propositions: 1) "Reasonable doubt" is self defining and the phrase itself will, therefore, presumably convey to the jury the heavy burden placed upon the prosecution; and 2) as "reasonable doubt" is difficult to define, attempts at definition will often result in obfuscation and a lessening of the burden of proof.[7] The latter argument offers scant support for these holdings. Courts are often required to deal with difficult concepts. That is hardly a basis to abandon the task.

In fact, an appropriate definition, free of obfuscating language, has been developed over time. Thus, reasonable

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7. The circuits adopting this position do not address the inherent paradox it presents. Specifically, how a term so clearly understood by a lay juror that it requires no definition, can at the same time, be so difficult to define that attempted definition often obfuscates its meaning.

doubt has been defined as the kind of doubt which would cause a reasonable person to hesitate before acting in the most important affairs of his or her life. *See Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 138 (1958); *United States v. Munson,* 819 F.2d 337 (1st Cir. 1987); *United States v. Ivic,* 700 F.2d 51, 68 (2d Cir. 1983); *United States v. Restaino,* 369 F.2d 544, 546 (3d Cir. 1966); 1 Devitt & Blackmar, *Federal Jury Practice & Instructions,* § 11:14 (3d Ed. 1979); 1 Sand, *et al.*, *Modern Federal Jury Instructions,* Instruction 4-2 (1991).

The more significant issue is whether the term is sufficiently self-defining. That is, whether it adequately conveys to the lay person the heavy burden placed upon the prosecution without further elaboration. The circuit courts of appeals which have held that no definition need be given, have assumed, without any real analysis, that the term "reasonable doubt" automatically conveys to lay persons the same heavy burden of proof that it projects upon the minds of trained trial lawyers and judges.

That assumption, however, is fatally flawed. As noted by Judge Wiggins joined by three other judges dissenting from the Ninth Circuit Court of Appeals *en banc* decision in *United States v. Nolasco,* 926 F.2d at 873-74,

> [t]he phrase "beyond a reasonable doubt" conveys an important legal concept. It is not a common phrase used by lay people and does not have a self-evident meaning. True, each word in the phrase occurs regularly in common speech. However, placed together without further explanation, the words do not necessarily convey the high standard of proof that the due process

> clause requires. *United States v. Witt,* 648 F.2d 608, 612 (9th Cir. 1981) (Anderson, J., concurring). It is not immediately obvious to individuals untrained in the law that proof beyond a reasonable doubt means a higher level of proof than preponderance of the evidence. *See* David U. Strawn & Raymond W. Buchanan, *"Jury Confusion: A Threat to Justice,"* 59 *Judicature* 478, 481-82 (May 1976) (study shows high standard of proof not comprehended from the language "to the exclusion of and beyond every reasonable doubt"). Some explanation is necessary to alert the jurors that they must be almost certain before returning a verdict of guilty. *See* McBaine, *Burden of Proof: Decrees of Belief,* 32 Calif. L. Rev. 242, 265-66 (1944).

As lay persons do not understand the phrase "beyond a reasonable doubt" to require a greater burden of proof than a mere preponderance of the evidence, simply instructing the jury that the government must prove its case beyond a reasonable doubt is patently insufficient. It permits a verdict based upon a lower standard of proof than is required by the Due Process Clause. Thus, a failure to adequately define "reasonable doubt" is equivalent to a failure to charge that guilt must be established by proof beyond a reasonable doubt. In either case, the accused is denied due process of law and the resulting conviction must be reversed.[8] As this case

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8. Relying upon *Kentucky v. Whorton,* 441 U.S. 786, 99 S.Ct. 2088 (1979), the Sixth Circuit has held that a failure to define "reasonable doubt" is subject to a totality of the circumstances analysis. *Whiteside v. Parke,* 705 F.2d 869 (6th Cir.), *cert. denied,* 464 U.S. 843 (1983). *Whorton* applied a totality of the circumstances test to determine

(footnote continued on following page)

squarely presents the issue of whether a failure to define reasonable doubt is a violation of due process of law, this petition should be granted.

3. Even assuming *arguendo,* that the failure to define "reasonable doubt" is subject to a totality of the circumstances analysis, the Court of Appeals erred in failing to follow the holdings of this Court when it affirmed petitioner's conviction.

It is clear that in determining whether a failure to charge the presumption of innocence amounts to a due process violation, a court must consider the totality of the circumstances, *Kentucky v. Whorton,* 441 U.S. 786, 99 S.Ct. 2088 (1979); *Taylor v. Kentucky,* 436 U.S. 478, 98 S.Ct. 1930 (1978). Thus, in holding that the failure to charge the presumption of innocence denied the defendant due process of law, the *Taylor* Court found it significant that the charge as a whole was "spartan," that the prosecutor's arguments permitted the jury to draw inferences of guilt from the indictment and Taylor's status as a defendant, and that the evidence of guilt was weak. *Taylor* at 486-88, 98 S.Ct. at 935-36.

(footnote continued from previous page)
whether a state habeas petitioner was denied due process by the failure to charge the presumption of innocence. While a failure to charge the presumption of innocence can be counterbalanced by other circumstances, failing to define reasonable doubt cannot. The core concepts of the presumption can be conveyed by other means which assure that the burden of proof remains on the prosecution and that no adverse inference is drawn against the accused by reason of his status as a criminal defendant. However, a failure to define "reasonable doubt" leaves the trier of fact without sufficient tools to determine whether the prosecution has met its heavy burden of proof. This fundamental constitutional defect cannot be overcome by other factors in the case.

In the present case, the Court of Appeals acknowledged that it must apply a totality of the circumstances test (App. B at 17a-18a and 20a-21a). And, while the court employed a totality of the circumstances analysis in reviewing each of the assigned errors separately, it never considered the cumulative effect of those errors. Thus, contrary to this Court's explicit holdings in *Taylor* and *Whorton,* the Court of Appeals viewed the failure to define reasonable doubt, the failure to charge the presumption of innocence and the prosecutor's improper cross-examination and summation in isolation from each other. Thus, not until after the Court concluded that the failure to define reasonable doubt "does not rise to the level of plain error" (App. B at 21a), did it severely consider the failure to charge the presumption of innocence. And, only after concluding that the failure to charge the presumption of innocence "was not reversible error" (*Id.*), did the Court consider the prosecutor's improper cross-examination and summation. Thereafter, based upon its erroneous conclusion that the defects in the charge did not constitute plain error, the Court incorrectly identified the remaining issue as "whether the prosecutor's statements, *considered alone,* warrant reversal." (App. A at 6a) (emphasis added).

Indeed, the Court of Appeals also erred in holding that the failure to define reasonable doubt was not plain error in part because trial counsel for Telesford and Ingrati each set forth a definition of reasonable doubt in closing argument (App. B at 20a). First, this reliance on statements of counsel is clearly contrary to this Court's holding that "arguments of counsel cannot substitute for instructions by the court." *Taylor,* at 488-89, 98 S.Ct. at 1936. In *Taylor,* petitioner's counsel had argued the presumption of innocence both in his opening and closing

remarks. Nevertheless, the failure of the court to charge the presumption denied Taylor due process of law. Secondly, one of the pitfalls of reliance upon the marks of counsel is fully illustrated by the instant case in which Ingrati's trial counsel presented a definition of reasonable doubt condemned by the Second Circuit Court of Appeals as permitting conviction upon a standard of proof less than beyond a reasonable doubt. *See,* A. at 481-82; *United States v. Attanasio,* 870 F.2d 809, 818 (2d Cir. 1989); *United States v. Kahn,* 821 F.2d 90, 92-93 (2d Cir. 1987).

If the Court of Appeals analysis is correct, the Court in *Taylor* should have first decided whether the failure to charge the presumption of innocence was reversible error without considering the prosecutor's improper remarks. Then, if the failure to so charge was not reversible error, this Court should have reviewed the prosecutor's remarks "standing alone." This is the precise approach rejected in *Taylor.*

The Court of Appeals decision in this case stands *Taylor* on its head. In order to correct this failure to follow established precedent, this Court should review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May, 1991

Respectfully submitted,
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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3437

UNITED STATES OF AMERICA

vs.

INGRATI, SALVATORE

SALVATORE INGRATI,

Appellant.

Appeal from the United States District Court
for the District of Delaware
(D.C. Crim. No. 89-00049-7)
District Judge: Honorable Jane R. Roth

Submitted Under Third Circuit Rule 12(6)
February 4, 1991
Before: MANSMANN and SCIRICA, *Circuit Judges,* and
POLLAK, District Judge.*

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* Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

(Filed Feb. 11, 1991)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Salvatore Ingrati challenges his conviction, following a jury trial, of conspiring to distribute controlled substances in violation of 21 U.S.C. § 846, distributing heroin in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and possessing a firearm during the commission of a narcotics offense in violation of 21 U.S.C. § 924(c)(1). Following his conviction, Ingrati was sentenced to concurrent 260 month terms of imprisonment on the conspiracy and distribution counts and to 60 months imprisonment for possession of a firearm. The court also imposed a five-year period of supervised release and required that Ingrati pay a $150.00 special assessment.

Ingrati challenges his conviction and sentence on a number of grounds. With respect to his conviction, Ingrati argues that fundamental errors in and omissions from the district court's charge to the jury rose to the level of plain error so as to deprive him of due process. Errors in this charge are alleged to have been compounded by the prosecutor's improper cross-examination. Ingrati also asserts that the district court erred in imposing sentence by improperly calculating the base offense level, had some responsibility for the distribution of cocaine by other conspirators, holding that Ingrati was responsible for distributing in excess of

three kilograms of heroin, and in departing from the sentencing guidelines. Because we find no error in the district court's disposition of this matter, we will affirm the judgment of the district court. We consider Ingrati's arguments in the order in which they were presented.

I.

Ingrati mounts three due process challenges to the district court's instructions to the jury. First, Ingrati contends that the district court erred in failing to include an instruction regarding the presumption of innocence in the final charge to the jury and in failing, at any point in the charge, to define the term "reasonable doubt." We have considered the identical allegations of error at some length in connection with the appeal of Ingrati's co-defendant, Alexis Telesford, and have found them to be without merit.[1] We will not repeat our discussion here but will focus instead upon another of Ingrati's allegations of error which differs slightly from those raised by Telesford.

Ingrati argues that even if the district court's failure to define the term reasonable doubt did not constitute error in and of itself, this lack of definition, when coupled with the court's discussion of circumstantial evidence, "invited the jurors to confuse the reasonable doubt standard with some lesser standard of proof." Ingrati focuses on the following portion of the charge:

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1. See our memorandum opinion in *United States v. Telesford,* No. 90-3381 (3d Cir. 1991).

Appendix A
Opinion of United States Court of Appeals

> It is not necessary that circumstantial evidence excluded [sic] every reasonable hypothesis consistent with innocence to support a conviction of conspiracy, but the evidence must nevertheless rise above mere speculation and conjecture -- it must suffice to prove the elements of a conspiracy beyond a reasonable doubt.

He argues that the court's use of the terms "conjecture" and "speculation" in connection with the undefined term "reasonable doubt" "left the jurors totally adrift, free to deliberate the defendant's guilt almost without guidance as to the prosecution's burden of proving it."

Because Ingrati raises his objection to the jury instructions for the first time on appeal, we review the charge for plain error. "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977), cited in *United States v. Palmeri,* 630 F.2d 192, 201 (3d Cir. 1980), *cert. denied,* 450 U.S. 967 (1980). An error may be raised for the first time on appeal under this doctrine if it "affects substantial rights" or would work a "manifest injustice." We find no such error here.

The instruction concerning circumstantial evidence was apparently taken, almost word-for-word, from our statement of the law in *United States v. Pepe,* 512 F.2d 1129, 1134 (3d Cir. 1975):

> Although it is not necessary that circumstantial evidence exclude every reasonable hypothesis consistent with innocence to support a conviction

> of conspiracy, the evidence must nonetheless rise above mere speculation and conjecture --it must suffice to prove the elements of a conspiracy beyond a reasonable doubt.

(Citations omitted.) We do not believe that this statement of the law or the corollary instruction to the jury creates any risk that the reasonable doubt standard will be confused with some lesser standard of proof. We quite agree with the government that the district court was actually drawing a distinction in order to *protect* Ingrati. The jury was instructed not to base a conviction upon speculation and conjecture but to base its decision instead upon that which was proven beyond a reasonable doubt.[2] We find no merit to Ingrati's assignments of error based on the district court's charge with respect to circumstantial evidence.

Ingrati's final assignment of error with regard to the jury instructions centers on his cross-examination by the prosecutor. Three times during cross-examination, Ingrati was asked to state whether government agents whose testimony differed from his own, had lied. Despite his counsel's objection to this questioning, Ingrati was required to answer. The prosecutor used

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2. *United States v. Khan*, 821 F.2d 90, 92-93 (2d Cir. 1987), and *United States v. Attanasio*, 870 F.2d 809, 818 (2d cir. 1989), cited by Ingrati, do not support his claim of error in this case. These cases counseled trial courts to avoid the "two inference" charge, i.e., a charge which states that if the jury believes that the evidence permits either the inference of innocence or guilt, the jury should not adopt the former. The charge given here was not and cannot be construed as a "two inference charge" and does not give rise to the dangers of confusion inherent in such charges.

these answers in argument to the jury saying, "Yesterday Mr. Ingrati called Mr. Ryan a liar and said he lied in that regard," and "Yesterday Salvatore Ingrati claimed that the agent lied about that .... I submit to you again there is no reason for Agent Antab to lie about that. Between the two of them, I submit to you the one to believe that was telling the truth is Agent Antab."

Ingrati contends that the questions asked on cross-examination were improper in that they "dilute[d] the government's burden of proving guilt beyond a reasonable doubt by suggesting that the trial is a credibility contest between the accused and the government agents." This was especially true, Ingrati argues, where the trial court failed to instruct the jury adequately as to the presumption of innocence and the definition of reasonable doubt. As we have already concluded that there was no defect in the district court's charge to the jury, we must determine whether the prosecutor's statements, considered alone, warrant reversal.

The case law cited by Ingrati makes clear that, at least in other jurisdictions, prosecutorial statements "to the effect that, if the defendant is innocent, government agents must be lying" are disfavored and may result in reversible error. *United States v. Richter,* 826 F.2d 206, 209 (2d Cir. 1987). The problem with such statements is that they may "in effect distort the burden of proof by suggesting incorrectly what the jury must find in order to reach a certain verdict." *United States v. Vargas,* 583 F.2d 380, 386 (7th Cir. 1978).

Despite the fact that the prosecutor's argument in this case was not a model one, we are mindful that in

evaluating allegations of prosecutorial misconduct, our role is to determine whether the prosecutor's remarks, viewed in the context of the entire trial, were so prejudicial as to deprive the defendant of his right to due process. We will reverse a conviction only where prejudice results from the alleged improprieties. *United States v. Adams,* 759 F.2d 1099, 1111 (3d Cir. 1985).

In this case we find no prejudice sufficient to warrant overturning Ingrati's conviction. We do not read the prosecutor's remarks in summation as having modified the government's burden to prove each element of its case against Ingrati beyond a reasonable doubt. The prosecutor's argument could not reasonably have been interpreted by the jury to mean that it had no choice but to find Ingrati guilty if it found the FBI agents' testimony credible. The district court repeatedly instructed the jury that the government was required to prove each element of its case beyond a reasonable doubt and informed the jury that it was the sole and exclusive judge of the facts. The jury was instructed to pass upon the weight of the evidence, the credibility of the witnesses, and to resolve any conflicts which might exist in the evidence. The jury was also informed that the statements and arguments of counsel did not constitute evidence. We believe that the instructions given and the substantial character of the evidence against Ingrati introduced at trial support our conclusion that any impropriety in the prosecutor's cross-examination and summation did not rise to the level of reversible error. This is especially true where there is nothing in the record to indicate that counsel for Ingrati did, in fact, object to the statements made in summation.

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II.

Having found no reversible error in Ingrati's conviction, we turn to those claims of error associated with the determination of sentence. Ingrati argues that the district court erred in setting his base offense level at 32 rather than 34. Specifically, Ingrati challenges the factors upon which this level was calculated, arguing that the district court erroneously concluded that he was responsible for transactions aggregating more than three kilograms of heroin and was responsible, in any event, for those drugs involved in the cocaine conspiracy.

We consider Ingrati's challenge to the heroin calculation first. We review the district court's calculation of the amount of heroin for which Ingrati was responsible under the clearly erroneous standard. *United States v. Ortiz,* 878 F.2d 125, 126 (3d Cir. 1989). Based upon our review of the information available to the district court, we cannot conclude that the court's estimate of the quantity of the sample was clearly erroneous.

Sentencing Guidelines Section 2D1.1 establishes a base offense level of 34 for any drug offense involving 3 to 9.9 kilograms of heroin or 15 to 49.9 kilograms of cocaine or equivalent Schedule I or II stimulants. The government argued and the district court accepted that Ingrati was responsible for transactions in heroin exceeding three kilograms of heroin. The amounts of heroin attributable to Ingrati were calculated as follows: 1) On February 28, 1989, Ingrati's co-conspirator, Lena, sold 504.9 grams of heroin; 2) an additional half kilogram was attributed to activities on the same date as

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Lena said that he had divided a full kilogram in half in order to make the 504.9 gram sale; and 3) 1,271 grams of heroin seized by the FBI on July 18, 1989. The amounts of heroin involved in these three transactions totaled 2-1/4 kilograms. Ingrati contends that this is the maximum amount of heroin attributable to him and that he is, therefore, entitled to a base offense level of 32.

The government argued at sentencing, and the district court agreed, that an additional quantity of heroin should be attributed to Ingrati because a heroin sample submitted to an FBI agent on July 13, 1989 differed markedly in purity from the heroin seized on July 18. In order to quantify the amount of this additional heroin, the district court looked to the Sentencing Guidelines, Section 201.4, comment. (n.2)[3] which provides that

> [W]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the

3. The *Guidelines Manual* details how guideline commentaries are to be used. "The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the *Guideline* or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." *Guidelines Manual,* § 1131.7 (1989)

> defendant and the size or capability of any laboratory involved.

Using the factors delineated in the comment, the court concluded that the July 13th sample had been taken from a quantity of heroin sufficient to raise the total amount attributable to Ingrati above the three kilogram level. In addition to the evidence of heroin transactions described above, the court referenced the statement of a co-conspirator, Belliti, that 300, 400, or 500 kilograms of cocaine were moved each month and the statement of a co-conspirator, Lena, on May 22, 1988 that they still had about half-a-kilogram of heroin. "All of this is indicative of a conspiracy, the scope-of which goes well beyond the two actual deliveries in which Mr. Salvatore Ingrati was involved."

Ingrati challenges the district court's conclusion that the July 13th sample had been taken from a supply which, when combined with known quantities of heroin, was sufficient to aggregate more than three kilograms. He argues that the court had no basis, other than speculation, for its determination that the package, from which the July 13th sample was taken, was of a weight sufficient to aggregate three kilograms.

Section 2D1.14, comment (n.2) specifically recognizes that courts will be required, in certain circumstances, to confront situations where quantities of drugs are not known. Some "speculation" is necessary each time a court confronts the circumstances anticipated by the 21D1.4 commentary. The commentary does, however, set forth factors to be considered in ensuring that the "speculation" is reasonable. The district

court focused on one of these factors, similar transactions in controlled substances by Ingrati, and concluded that it was reasonable to assume that the supply from which the July 13th sample had been taken was large enough to push Ingrati over the three kilogram threshold.

Based on the amounts involved in those prior transactions (504.9 grams, 495.1 grams -- the remainder of the kilo from which the 504.9 grams were taken -- and the 1,271 grams seized by the FBI), we cannot say that the district court erred in estimating that the supply in question totalled at least .78 grams. As we have already noted, the district court, in setting Ingrati's base offense level, also considered evidence relating to the overall conspiracy charge. The guidelines are clear that where a defendant has been convicted of a drug-related conspiracy, "each conspiracy transaction shall be included with those of the substantive counts to determine scale." U.S.S.G. § 2D1.4 comment. (n.1).[4]

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4. Ingrati was charged with conspiracy to distribute heroin and cocaine. Ingrati denies his involvement with cocaine and challenges the consideration of cocaine transactions in the setting of his base offense level. Because we conclude that the base offense level was properly set at 34 with reference only to the heroin transactions, we need not reach this argument.

Ingrati also contends that the district court erred by considering "the possibility of future transactions in determining the scope of the conspiracy." Our review of the record does not indicate that future transactions were a factor in setting Ingrati's base offense level. The district court referenced only actual heroin transactions and the statements of co-conspirators regarding actual transactions.

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Having examined the district court's determination of the base level offense in light of the record, we believe that there was ample evidence to support setting Ingrati's base offense level at 34 and find no error in the district court's having done so.

Finally, Ingrati challenges the district court's decision to grant a two-level upward departure in his sentence based upon the conclusion that the heroin sold was of "unusually-high purity."

Our review of the district court's application of the Sentencing Guidelines is plenary. *United States v. Ryan,* 866 F.2d 604 (3d Cir. 1989). Section 2D1.1, comment (n.9) of the Sentencing Guidelines makes clear that unusually high purity of heroin may warrant upward departure and is an aggravating circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b). Ingrati argues that the commentary is inapplicable here as there was no evidence in the record from which the court could conclude that the 86% purity of the heroin last sold by Ingrati was "unusually high;" the prosecution made no attempt to establish the norm.

Our review of the guidelines and the case law convinces us that the guidelines do not require that purity be determined with reference to other similar quantities of drugs. Purity, under the guidelines, serves to locate the defendant in the chain of distribution and upward departure permits the courts to treat sources in accordance with their true culpability. *United States v. Davis,* 868 F.2d 1390, 1393 (5th Cir. 1989).

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At the time of sentencing, the court had before it the affidavit of George J. Wagner, special agent for the Drug Enforcement Agency, and an expert in the area of trafficking in the United States. Wagner stated that he had reviewed DEA lab reports analyzing the heroin at issue and finding it to have a strength of 77% or greater, "unusually high strength." Wagner also averred that

> Any strength of 50% or greater is considered very good heroin; strengths of 77% and above are exceptionally good. In this regard,when a DEA lab report indicates the strength of heroin is, for example, 77%, this means the heroin is essentially in the same condition as when it left the clandestine heroin laboratory ... Based on my experience, with respect to all heroin exhibits in this case having a strength of 77% or greater, the sellers were either dealing directly with a heroin laboratory or were separated from the heroin laboratory only by transporter or couriers.

The strength of heroin injected by addicts was said to be between two and seven per cent.

Based on this uncontroverted affidavit, we conclude that the district court did not err in applying the guidelines to depart upward on the basis of drug purity.

Finally, Ingrati argues that the sentence imposed resulted from an incorrect application of the Sentencing Guidelines in that the district court began at the top of the guideline range for his offense level and then

departed upward. We recognized in *United States v. Denardi,* 892 F.2d 269 (3d Cir. 1989), that we do not have jurisdiction to consider the issue of where, within the applicable guideline range, the district court sets the sentence. The district court's determination to sentence at the top of the guideline range is not appealable where it was not the result of an incorrect application of the guidelines. We have determined that the guidelines were properly applied and thus will not examine Ingrati's argument based on range.[5]

III.

Having found no error in Ingrati's conviction or in the determination of his sentence, we will affirm the district court's judgment of sentence.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann

Circuit Judge

5. Ingrati adopts by reference any applicable argument raised by co-defendants in related appeals. We have found no reversible error in any of these cases and thus do not repeat our discussion of issues raised in other appeals.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3381

UNITED STATES OF AMERICA

vs.

TELESFORD, ALEXIS,

Appellant.

Appeal from the United States District Court
for the District of Delaware
(D.C. Criminal No. 89-00049-6)
District Judge: Honorable Jane R. Roth

Submitted Under Third Circuit Rule 12(6)
February 4, 1991
Before: MANSMANN and SCIRICA, *Circuit Judges,** and
POLLAK, *District Judge.**

(Filed February 7, 1991)

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*Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Defendant Alexis Telesford challenges his conviction on counts of conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. § 846, distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), participation in a racketeering activity in violation of 18 U.S.C. § 1962(c), and two counts of interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952(a)(3). Telesford contends that the district court erred in failing to provide the jury with a definition of the term "reasonable doubt" and in failing to instruct the jury regarding the presumption of Telesford's innocence. Because we find no error in the district court's charge to the jury, we will affirm the judgment of sentence of the district court.

I.

In addressing Telesford's claims of error, which are raised for the first time on appeal, we begin by noting that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977), cited in *United States v. Palmeri,* 630 F.2d 192, 201 (3d Cir. 1980), *cert. denied,* 450 U.S. 967 (1980). Where no objection to the charge was raised in the district court,

we review the instructions for plain error. Fed. R. Crim. P. 30; Fed. R. Grim. P. 52(b); *United States v. Piccolo,* 835 F.2d 517 (3d Cir. 1988). Plain error is that which affects the "fairness, integrity, or public reputation of judicial proceedings" or results in a miscarriage of justice. *United States v. Young,* 470 U.S. 1, 15 (1985), cited in *United States v. Berkery,* 889 F.2d 1281, 1283 (3d Cir. 1989). On the record before us we conclude that the district court did not commit plain error or, for that matter, any error in instructing the jury with respect to Telesford.

We turn our attention first to the district court's failure, *sua sponte,* to include in its instructions to the jury a definition of reasonable doubt. Telesford cites no case which stands for the proposition that the failure of the district court to define reasonable doubt, in the absence of a request that it do so, constitutes reversible error. The case law which does address this issue supports the opposite conclusion. *See United States v. Quinn,* 315 F.2d 425, 426 (4th Cir. 1963) ("while some further explanation of 'reasonable doubt' might have been given, we are unwilling to say the failure to do so, when not requested, was error") (citations omitted).

We find it significant that a number of courts have not automatically found reversible error even where a defendant has specifically requested that the term "reasonable doubt" be defined or has objected to the definition given. In *Whiteside v. Parke,* 705 F.2d 869 (6th Cir. 1983), *cert. denied,* 464 U.S. 843 (1983) the district court declined to give the defendant's proposed instruction on reasonable doubt and, in fact, gave no instruction defining this term. The Court of Appeals for

the Sixth Circuit concluded that the "proper approach for evaluating whether the failure to define reasonable doubt was a constitutional violation in this case appears to be a [totality of the circumstances] approach set forth by the Supreme Court in *Kentucky v. Whorton,* 441 U.S. 786, 789 (1979)." 705 F.2d at 871. In *Whorton,* the Supreme Court, considering a trial court's failure to give an instruction on the presumption of innocence, concluded that

> such a failure must be evaluated in light of the totality of the circumstances -- including all the instructions to the jury, the argument of counsel, whether the weight of the evidence was overwhelming, and other relevant factors-- to determine whether the defendant received a constitutionally fair trial.

414 U.S. at 789. Applying the *Wharton* test to the facts before it, the court in *Whiteside* concluded that the district court's failure to define the term "reasonable doubt" did not rise to the level of reversible error. *See also United States v. Marquardt,* 786 F.2d 771, 785 (7th Cir. 1986)(failure to instruct on reasonable doubt even where an acceptable instruction has been offered is not prejudicial error); *United States v. Headspeth,* 852 F.2d 753, 755 (4th Cir. 1985)(so long as trial court properly instructs the jury that the government must prove the defendant's guilt beyond a reasonable doubt and that this burden remains with the government throughout the trial, the failure to define reasonable doubt, even where the defendant requests definition, is not reversible error); *United States v. Witt,* 648 F.2d 608 (9th Cir. 1981)

(even where defendant requests that reasonable doubt be defined, decision is left to the discretion of the trial court).

Furthermore, as the government points out, our sister courts for the First, Fourth and Seventh Circuits have held that the term "reasonable doubt" is self-explanatory and have explicitly discouraged the district courts from attempting to define that term. "An attempt to define reasonable doubt presents a risk without any real benefit." *United States v. Hall,* 854 F.2d 1036, 1039 (7th Cir. 1988). *See also United States v. Campbell,* 874 F.2d 838 (1st Cir. 1989), and *United States v. Headspeth,* 852 F.2d at 753.

Given the applicable law with respect to instructions defining reasonable doubt and the state of the record before us here, we are satisfied that the district court's failure to provide the jury with a definition of reasonable doubt does not rise to the level of plain error.[1] The district court made repeated reference to the reasonable doubt standard and clearly stated, more than once, that the government bore the burden of proof with regard to every essential element of each offense with which Telesford was charged. The district court also instructed the jury to "bear in mind

1. In so finding, we do not ignore our decision in *Blatt v. United States,* 60 F.2d 481 (3d Cir. 1932). There, we held that the court's failure to instruct the jury as to the definition of reasonable doubt, where such a request was made, constituted reversible error. *Blatt* is distinguishable on its facts; its precedential value may require re-evaluation in light of *Whorton.*

that the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence." Finally, counsel for Telesford and counsel for Telesford's co-defendant each set forth a definition of reasonable doubt in closing argument. Having carefully reviewed the totality of the charge given, "we find nothing in this record to make us fear that the jury was unaware of the heavy burden of persuasion placed upon the Government. That ultimately is the real purpose of a defining instruction in any event." *United States v. Lawson,* 507 F.2d 433, 443 (7th Cir. 1974).

II.

We also conclude that the district court did not err in instructing the jury with regard to the presumption of innocence. Telesford challenges this instruction, too, for the first time on appeal, contending that while the district court did instruct the sworn panel on the presumption of innocence, it failed to repeat the instruction in its final charge.

Any analysis of the adequacy of jury instructions on presumption of innocence must begin with the Supreme Court's opinion in *Kentucky v. Whorton,* 441 U.S. at 786. As we noted in our discussion of reasonable doubt, the Court in *Whorton* held that failure to give a jury instruction regarding presumption of innocence, even where one is requested, is not necessarily reversible error. Whether failure to give such an instruction compromises the constitutional fairness of a trial is to be evaluated in light of the "totality of the

circumstances." The circumstances of this case convince us that the district court's failure to include a presumption of innocence instruction in the final charge did not impair Telesford's right to a fair trial and does not, therefore, rise to the level of plain error.

Following empanelment and swearing of the jury, the district court twice gave a presumption of innocence instruction. At the same time, the court made it clear that the indictment merely described the charges against the defendant and was not "evidence of anything." In the final charge, the jury was instructed that the law never imposes upon a criminal defendant the duty to call any witness or produce any evidence. The jury was also instructed, both in the opening instructions and the final charge, to rely only on the evidence presented in determining whether defendants were guilty. Counsel for Telesford referred to the presumption of innocence in both opening and closing argument. Finally, the record reveals that the evidence introduced against Telesford and his co-defendant was substantial.

In these circumstances, we conclude that the district court's failure to include a presumption of innocence instruction in the final charge was not reversible error.[2]

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2. The case law supports our conclusion. *See, e.g., United States v. Solomon,* 856 F.2d 1572 (11th Cir.), *cert. denied,* 109 S.Ct. 1352 (1989). Those cases cited by defendant for the opposite proposition, *United States v. Fernandez,* 496 F.2d 1294 (5th Cir. 1979) and *McDonald v. United States,* 284 F.2d 232 (D.C. Cir. 1960), are pre-*Whorton* cases and, in any event, are legally and factually distinguishable from this case.

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III.

Having evaluated Telesford's challenges to the jury instructions delivered by the district court against the background of the record before us, we find no plain error and will, therefore, affirm the judgment of sentence of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann

Circuit Judge